Filed 3/25/16 Marriage of Yacoub and Dawoud CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Marriage of ANNETTA YACOUB and FREDDY DAWOUD.	
ANNETTA YACOUB, Respondent, v. FREDDY DAWOUD, Appellant.	B261334 c/w B262471 (Los Angeles County Super. Ct. No. BD588111)

APPEAL from orders of the Superior Court of Los Angeles County. Trent Lewis, Judge. Affirmed.

Freddy Dawoud in pro. per.; Law Offices of Charles O. Agege for Appellant.

Law Offices of Jeffrey W. Doeringer for Respondent.

Appellant Freddy Dawoud moved to set aside orders issued by the family court, contending the proof of service filed by respondent Annetta Yacoub, was fraudulent. On appeal, he contends that the court's denial of the motion to set aside represented an abuse of discretion, as substantial evidence did not support it, and that the failure to serve him in compliance with the provisions of the Hague Convention rendered the attempted service ineffective. We conclude the court's finding that appellant had been personally served as stated in the proof of service was supported by substantial evidence, and that appellant forfeited the contention concerning the Hague Convention by failing to raise it below. Accordingly, we affirm the denial of the motion to set aside.

Appellant filed a separate appeal of the court's final orders on child custody, and spousal and child support, predicating his challenge to those orders on the same issues raised in his appeal of the denial of his motion to set aside. He raises no independent issues concerning the substance of those orders, and we affirm those orders on the grounds stated above.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Court's November 19, 2013 Orders*

Appellant and respondent were married for approximately eight years. They had two children, Daniel and Nathalie. The family lived in Egypt until 2011, when they moved to California.[1]

On August 29 and 30, 2013, respondent, representing herself, filed a number of pleadings and papers, including a petition for custody and support of minor children and a request for a child abduction prevention order, alleging appellant

[1] The children were born in Egypt, but have U.S. citizenship through appellant, a naturalized citizen.

had kidnapped their son on August 26.[2] On October 29, 2013, respondent retained counsel and filed a new packet of pleadings and papers, including a petition for dissolution of the marriage and an RFO seeking: custody of the two children, child support, spousal support, attorney fees and costs, a temporary emergency court order, and a property control order.[3] Included in the October 29 filings was a request for a domestic violence restraining order, precluding appellant from contacting or harassing respondent and the children, and a request that respondent be permitted to serve the notice of hearing on the RFO and the request for domestic violence restraining order on appellant by mail at his last known address in Egypt. Respondent filed a more detailed declaration describing an incident of domestic violence in May 2013, appellant's deceptive actions leading to his taking Daniel to Egypt in August 2013 without her knowledge or consent, and his attempt to persuade Nathalie to accompany them.

On October 29, the court issued a temporary order instructing appellant to return Daniel to respondent, granting physical and legal custody of Daniel and Nathalie to respondent, and precluding appellant from visitation.[4] The court set a

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[2] Appellant also filed a declaration under the Uniform Child Custody Jurisdiction and Enforcement Act (Fam. Code, § 3400 et seq., UCCJEA), describing the children's residences for the preceding five years, and a request for order (RFO) seeking sole physical custody of the children, no visitation for appellant, and a temporary emergency order requiring appellant to return Daniel to respondent in California. Attached to the RFO was respondent's declaration stating that Daniel had been taken to Egypt by appellant without her knowledge or consent.

[3] Respondent also filed a new declaration under UCCJEA describing the children's residency for the preceding five years; a request for a child custody and visitation order precluding appellant from visiting the children or taking them out of Los Angeles County; a request for a "[n]o travel with [c]hildren" order; and a "petition for writ of habeas corpus and emergency motion for return of [Daniel]."

[4] The order also permitted the court clerk to sign transfer documents to transfer title to the family's two vehicles to respondent and froze the couple's bank accounts, allowing
(Fn. continued on next page.)

November 19, 2013 hearing on these matters. The order stated: "[Respondent] shall serve [appellant] via US Mail to his last known address in Egypt."

The court separately issued a temporary restraining order (TRO), and scheduled a hearing on November 19, 2013 for the domestic violence restraining order. The TRO stated that at least two days prior to the hearing, appellant was to be personally served with a file-stamped copy of the notice of hearing and the request for domestic violence restraining order.

On the date of the November 19, 2013 hearing, at which appellant did not appear, respondent filed a "proof of personal service" of summons (POS or November 2013 POS). The POS stated that on November 7, 2013, Aittia Yacoub, respondent's father, had personally served the summons and petition for dissolution of marriage on appellant at an address in Cairo, Egypt, along with a number of other pleadings and papers, including the court's October 29, 2013 order, the writ of habeas corpus, the request for domestic violence restraining order, and the TRO. The POS was signed by Aittia Yacoub under penalty of perjury.

At the November 19 hearing, the court found appellant had been "personally served in Egypt" and had "received notice of pleadings, this hearing and [the] court's orders." The court issued an order granting sole physical and legal custody to respondent. The order restated the court's "no visitation" order for appellant and its "no travel" order for the children. It permitted assets to be sold and bank funds transferred to pay respondent's attorney fees, and directed the Los Angeles

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respondent to withdraw funds from them to satisfy child and spousal support obligations and to pay attorney fees. The court also issued separate orders precluding appellant from custody, visitation, and travelling with the children, and issued the requested writ of habeas corpus.

County District Attorney to take all action necessary to locate Daniel and return him to respondent.

That same date, the court also issued a separate three-year domestic violence restraining order, expiring November 19, 2016, precluding appellant from contacting or harassing respondent and the children.

In December 2013, respondent flew to Cairo and took Daniel into her custody, returning him to California. On December 31, 2013, appellant, represented by counsel, filed a response to the petition for dissolution of marriage. In January 2014, appellant's counsel stated he was authorized to accept service of all pleadings on appellant's behalf via email. On January 16, 2014, respondent filed a proof of electronic service, stating that a number of documents -- essentially the same documents that had been listed in the November 2013 POS -- had been electronically served on appellant's counsel on behalf of appellant.

B. *Motion to Set Aside*

On May 1, 2014, appellant filed a request to set aside the court's November 19, 2013 "restraining order[]."[5] Appellant contended the November 2013 POS was fraudulent, and that he had not been personally served with any papers in Cairo in November 2013, contrary to Aittia Yacoub's attestation.[6] Appellant submitted a

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[5] Although appellant repeatedly referred to the order he sought to set aside as the "restraining order," he attached as an exhibit to his RFO not the domestic violence restraining order, but the separate order in which the court, among other things, granted sole legal and physical custody of the children to respondent and directed the disposition of certain assets.

[6] Appellant moved under Family Code section 3691, which permits a party to set aside "a support order" if procured by actual fraud or perjury, or if the party did not receive actual notice. In addition, he cited *County of San Diego v. Gorham* (2010) 186 Cal.App.4th 1215, holding that a court has "inherent power to vacate a default judgment or order on equitable grounds where a party establishes that the judgment or order was
(Fn. continued on next page.)

declaration stating that Yacoub had confessed to an Egyptian prosecutor that he had not served appellant. Attached to the declaration was an English-language translation of a document entitled "General Prosecutor's Questioning Sessions" purportedly prepared by Egyptian authorities. The document included a transcript of a series of questions about the November 2013 POS and Yacoub's answers. In response to a question about the representation made in the proof of service that Yacoub had personally given appellant copies of the listed documents, Yacoub reportedly said: "I notified him [appellant] on phone, but I did not remit any documents to him." In the document's conclusion, the prosecutor indicated he did not intend to file any charges against Yacoub.

In her opposition, respondent stated that her father was scheduled to appear at a deposition and she expected him to testify that he had served appellant personally in Egypt, as stated in the November 2013 POS. In his reply, appellant conceded that at Yacoub's deposition on May 22, 2014, he "changed his confession to state that he delivered the documents to [appellant] who cut them and threw them on the floor."[7]

The court held evidentiary hearings on the motion to set aside on June 3, August 6 and November 4, 2014.[8] Respondent testified at the June 3 hearing. At the August 6, hearing, the court ordered the parties to personally appear on November 4.

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void for lack of due process [citation] or resulted from extrinsic fraud or mistake [citation]," including a judgment or order "obtained based on a false return of service . . . ." (*Id*. at pp. 1228-1229.)

[7] The opposition was filed May 21; appellant's reply was filed May 30. Prior to the hearing on the motion to set aside, respondent lodged the deposition transcript with the trial court, but has not included the transcript in our record.

[8] The parties did not include transcripts of those hearings in the record.

Appellant was not present at the November 4 hearing, but his counsel appeared and contended that Aittia Yacoub was under criminal investigation in Egypt. The court observed that the investigation appeared to have been closed by the Egyptian prosecutor according to the documentary evidence submitted, and that counsel's representations to the contrary were hearsay. Although appellant failed to appear as ordered, providing respondent no opportunity to cross-examine him, the court did not strike his declaration. The parties discussed Yacoub's deposition, and appellant's counsel agreed there was nothing in the transcript to contradict the parties' representations that Yacoub testified he personally delivered the documents to appellant. The court denied the motion to set aside on the merits, and specifically found that appellant had been validly served prior to the issuance of the November 19, 2013 orders. The court set a January 5, 2015 hearing on respondent's request for child and spousal support. Appellant noticed an appeal of the November 4, 2014 order.

While the first appeal was pending, the court issued orders on January 5, 2015 setting the amounts to be paid by appellant for child and spousal support, granting sole legal and physical custody of the children to respondent, and precluding appellant from visitation. Appellant did not appear personally. He sought to appear telephonically, but the court denied his request. The orders issued on January 5 stated that appellant had been instructed to appear for the proceeding, and that he had failed to appear and had failed to file a responsive pleading. Appellant filed a separate notice of appeal of the January 5, 2015 orders. The appeals were consolidated by order of this court.

DISCUSSION

A. *Motion to Set Aside*

Appellant contends the trial court abused its discretion in denying his motion to set aside. Preliminary, we note some confusion concerning which of the court's November 19, 2013 orders is at issue. In the motion to set aside, appellant asked the court to set aside the "restraining order," but attached a copy of the separate order issued on the same date addressing custody issues and the disposition of assets. On appeal, appellant represents that he sought to set aside the domestic violence restraining order. The arguments appellant raises on appeal -- that the motion to set aside should have been granted as he was not personally served as stated in the November 2013 POS and that service did not comply with the Hague Convention -- could apply to either order. Accordingly, although we believe the issues on appeal are properly limited to the domestic violence restraining order, and any issues pertaining to the separate custody and assets order are forfeited, we will consider whether there were defects in service requiring the court to set aside either order.

1. *Substantial Evidence Supported the Court's Finding of Personal Service*

A court order or judgment obtained by extrinsic fraud may be set aside as void, provided the moving party acts with diligence upon learning of the relevant facts. (*Trackman v. Kenney* (2010) 187 Cal.App.4th 175, 181.) Extrinsic fraud occurs when """the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent,""" for example where the opponent fails to provide notice of a hearing and/or files a fraudulent proof of service. (*Manson, Iver & York v. Black* (2009) 176 Cal.App.4th 36, 47; see, e.g., *Trackman v. Kennedy*, *supra*, at p. 181; *In re Marriage of Kreiss* (1990)

224 Cal.App.3d 1033, 1039-1040.) A court has inherent power to set aside a void judgment or order. (*County of San Diego v. Gorham*, *supra*, 186 Cal.App.4th at p. 1229; *Talley v. Valuation Counselors Group, Inc*. (2010) 191 Cal.App.4th 132, 152.) In addition, Code of Civil Procedure section 473, subdivision (d) allows the court to set aside any judgment or order that is void for improper service of process or notice. (*Plaza Hollister Ltd. Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 19, fn. 11.) Family Code section 3691 provides a basis for setting aside "support order[s]" obtained by fraud.

An order denying a motion to set aside a judgment or order "is appealable, regardless of whether the time to appeal from the underlying judgment [or order] has expired." (*Sakaguchi v. Sakaguchi* (2009) 173 Cal.App.4th 852, 857, fn. 3, citing *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1137.) On appeal, the lower court's ruling on a motion to set aside a judgment or order "'is presumed to be correct . . . , and all intendments and presumptions are indulged in favor of its correctness.' [Citation.]" (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 718.) We review factual findings made by the trial court in resolving a motion to vacate for substantial evidence. (*Ramos v. Homeward Residential, Inc*. (2014) 223 Cal.App.4th 1434, 1440-1441; *Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 828.) Any statutory interpretations or legal conclusions are subject to independent review. (*County of San Diego v. Gorham, supra*, 186 Cal.App.4th at p. 1230.) Generally, whether to set aside a judgment or order is entrusted to the trial court's discretion, but because the law strongly favors disposing of cases on their merits, an order denying relief is scrutinized more carefully than one granting relief. (*Shapiro v. Clark, supra*, 164 Cal.App.4th at p. 1139; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419-1420.)

After appellant filed his motion to set aside, disputing that he had been served as stated in the November 2013 POS, the court held a series of hearings

over three days. Respondent testified, and the parties submitted declarations and deposition transcripts. Whether Aittia Yacoub had personally served the papers and pleadings on appellant in Cairo as set forth in the POS was hotly contested. The affidavit Yacoub signed supported a conclusion that the documents had been personally served. (See *Johnson & Johnson v. Superior Court* (1985) 38 Cal.3d 243, 255 [sworn affidavits of service "were sufficient to satisfy the trial court that all acts necessary to effect service had been performed in a timely fashion"].) The translated document provided by appellant suggested otherwise. At his subsequent deposition, Yacoub affirmed that he had personally served appellant. This raised an issue of contested fact, resolved by the trial court in respondent's favor.

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) After hearing all the evidence, the trial court found that appellant had been validly served and denied the motion to set aside. Reversal of this factual finding would violate basic precepts of appellate jurisprudence, and we decline to do so.

2. *Appellant Forfeited any Issue Concerning the Hague Convention*

Alternatively, appellant contends that service on him was improper because he was not served in accordance with the Hague Convention.[9] We conclude he forfeited any issue pertaining to the Hague Convention by failing to raise it below.[10]

"As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness -- it would be unfair, both to the trial court and opposing litigants, to permit a change of theory on appeal; and it also reflects principles of estoppel and waiver [citations]." (Eisenberg et. al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2015) ¶ 8:229, p. 8-167, italics omitted; accord, *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1323; *People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46; *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316; *Mattco Forge, Inc. v. Arthur Young & Co*. (1997) 52 Cal.App.4th 820, 847.)

Even a constitutional right may be forfeited by "'"the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."'

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[9] The Hague Convention is "an international treaty governing service of judicial and extrajudicial documents in civil or commercial matters upon citizens of signatory countries." (*Dr. Ing H.C.F. Porsche A.G. v. Superior Court* (1981) 123 Cal.App.3d 755, 758.) The United States of America became bound by its provisions in 1969. (*Shoei Kako Co. v. Superior Court* (1973) 33 Cal.App.3d 808, 819.) "'By virtue of the Supremacy Clause, U.S. Const., Art. VI, the Convention preempts inconsistent methods of service prescribed by state law in all cases to which it applies.'" (*Kott v. Superior Court* (1996) 45 Cal.App.4th 1126, 1133, quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 698-699.)

[10] Appellant's request that this court take judicial notice of the provisions of the Hague Convention was denied.

[Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 880-881; see, e.g., *In re B.G.* (1974) 11 Cal.3d 679, 689 [party who resided in Czechoslovakia and had not been given proper notice of dependency proceeding, waived any defect in notice by subsequently appearing through counsel and making substantive arguments without objecting to jurisdiction]; *In re P.A.* (2007) 155 Cal.App.4th 1197, 1199 [where notice was defective from the outset, but party appeared and participated in proceeding, waiting until appeal to seek relief on lack of notice and due process grounds, objection on those grounds was forfeited].)

Appellate courts have discretion to excuse forfeiture, but such discretion "should be exercised rarely and only in cases presenting an important legal issue." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) Here, no important legal issues are raised. Moreover, a finding that appellant was not properly served in November 2013 would have little overall impact on the underlying litigation. As respondent points out, appellant made a general appearance in December 2013, thereby acquiescing in personal jurisdiction and waiving any defect in service of the summons. (See *In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 8 [out-of-state party's appearance at hearing on RFO to determine arrearages in spousal support constituted a general appearance where nothing in the record supported party's assertion he participated only to object to court's assertion of jurisdiction over him].) The custody, visitation and support orders issued by the court prior to January 5, 2015 were preliminary and temporary.[11] (See *Lester v. Lennane* (2000)

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[11] Appellant's general appearance in December 2013 would not remedy a failure to give notice of the hearing at which the court issued the three-year domestic violence restraining order, an independent final order. (See *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 335 ["[A]n application for an order under the DVPA to restrain a person for the purpose of preventing the recurrence of domestic violence is, like a civil harassment petition under Code of Civil Procedure section 527.6, itself essentially a '"cause of action"' [citations], and may properly be considered an independent 'lawsuit'
(Fn. continued on next page.)

84 Cal.App.4th 536, 559-560 [temporary custody order not appealable "since it is made pendente lite with the intent that it will be superseded by an award of custody after trial"].) After making his general appearance in December 2013, appellant had ample opportunity to contest the support and custody issues, and to persuade the court he posed no danger of abducting the children and taking them to his home country. The court found in respondent's favor on these issues only after multiple hearings. Appellant does not contend the court's findings in this regard were not supported by substantial evidence. Accordingly, we decline to overlook the forfeiture.

B. *Appellant Provides No Basis for Reversing the January 5, 2015 Orders*

Appellant briefly addresses the court's January 5, 2015 orders, contending they rested on the orders issued in October and November 2013, and were "'fruit of the poisonous tree.'" As we have found that the trial court did not err in denying the motion to set aside, we reject this contention. Appellant also asserts the court was wrong to find that he failed to appear at the January 5 hearing, as he attempted to appear telephonically. He does not dispute that he failed to file a response to respondent's papers or suggest there were any substantive defects in the court's final orders. "An appellant must affirmatively demonstrate error through reasoned argument, citation to the appellate record, and discussion of legal authority." (*Bullock v. Philip Morris USA, Inc*. (2008) 159 Cal.App.4th 655, 685.) Where "an appellant fails to raise a point, or asserts it but fails to support it with

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[citation]."]; *Schraer v. Berkeley Property Owners' Assn*. (1989) 207 Cal.App.3d 719, 730 [person charged with harassment must be given "a full opportunity to present his or her case"].) However, as we have said, the court's finding that appellant had notice of that hearing was supported by substantial evidence, and we have no basis to reverse it.

reasoned argument and citations to authority," we treat the point as forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785; accord, *Nelson v. Avondale Homeowners Assn*. (2009) 172 Cal.App.4th 857, 862.) Any argument appellant may have with respect to the substance of the January 5 orders is forfeited.

DISPOSITION

The court's order of November 4, 2014 denying the motion to set aside and its orders of January 5, 2015 determining custody and spousal and child support are affirmed. Respondent is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.